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Reza Mohd Shah bin Ahmad Shah v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W–05–34 OF 2002

ABDUL KADIR SULAIMAN, ARIFIN ZAKARIA AND NIK HASHIM JJCA

13 OCTOBER 2005

C

Criminal Law — Drug trafficking — Dangerous Drugs Act 1952 — s 39B(1)(a) — Whether direct evidence of possession adduced — Whether necessary for prosecution to prove directly or inferentially that accused had knowledge of the dangerous drug — Whether prosecution ought to have invoked statutory presumption of possession — Whether prima facie case of trafficking made out against accused — Whether proma facie case of possession made out instead — Dangerous Drugs Act 1952 s 37(d), (da)

D

Evidence — Character of accused — Conduct of accused running away and throwing bag containing drugs when confronted by non-uniformed police officers — Inferences from such conduct — Whether sufficient to infer knowledge of the drugs — Whether such conduct could sustain other inferences

E

Evidence — Presumptions — Drug trafficking — Presumption of possession — Whether direct evidence to sustain possession of dangerous drugs in existence — Whether factual matrix favoured recourse to the statutory presumption of possession — Dangerous Drugs Act 1952 s 37(d), (da)

F

The appellant was convicted and sentenced to death in the High Court for trafficking in dangerous drugs, to wit 795.3g of cannabis. In convicting the appellant, the trial judge made a positive/direct finding of possession without recourse to the statutory presumption of possession under s 37(d) of the Dangerous Drugs Act 1952 ('the Act'). Upon this positive/direct finding of possession, the trial judge then applied the statutory presumption of trafficking under s 37(da) of the Act. In establishing positive/direct possession, the trial judge found the element of custody or control of the cannabis proved by the following direct evidence: (a) the appellant was seen carrying a plastic bag ('exh P3') for some distance; (b) when confronted by police officers, the appellant ran and threw exh P3 away; (c) when exh P3 was recovered, it was found to contain cannabis. With regard to the element of knowledge, the trial judge found that the conduct of the appellant in running away when confronted and throwing away exh P3 evinced a clear nexus between his conduct and the offence in question. Such conduct was an indication of his guilty mind and was sufficient to infer that he had knowledge of the existence of the cannabis in exh P3. The appellant appealed against conviction and sentence.

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Held, allowing the appeal:

(1) The conduct of the accused in running and throwing the bag (exh P3) away could also give rise to the inference that the appellant was behaving in the manner he did in respect of any other offence relating to what was contained in exh P3. The trial judge did not realize this. Such conduct of the appellant did not also point to the one and only conclusion that he knew what he was carrying was the dangerous drug cannabis. Such conduct could also give rise to the inference that he acted as he did because he was carrying some other prohibited goods or that he panicked upon being confronted by non-uniformed police officers (see paras 9–11); *Sim Teck Ho v Public Prosecutor* [2000] 4 SLR 39 distinguished and *Ton Su Kuan v Public Prosecutor* [2005] 3 CLJ 740 followed.

(2) The Court of Appeal could not agree with the trial judge's conclusion that it was not necessary for the prosecution to prove that the appellant had knowledge of the nature of the drug. In the instant case, with reference to the offence the appellant was charged with, it was necessary for the prosecution to prove directly or inferentially that the appellant had knowledge of the dangerous drug in the bag (exh P3). Here, in view of the appellant's conduct, it was necessary for the prosecution to have invoked the statutory presumption under s 37(d) of the Dangerous Drugs Act 1952 to deem the appellant in possession of the cannabis and to have known that exh P3 contained the cannabis. Since the statutory presumption had not been invoked, no prima facie case had been made out against the appellant. (see paras 12, 13).

(3) In the instant case, the issue of trafficking in the cannabis could not arise as possession of the said drug by the appellant was not made out by the prosecution. There was no direct evidence of possession with the requisite knowledge based on the evidence tendered. However, with the aid of the statutory presumption provided by s 37(d) of the Act, the prosecution had made out a prima facie case for an offence under s 6 of the Act for being in possession of the cannabis. The appellant's defence at the trafficking trial ought to have been considered as a defence on the reduced charge of possession. His defence however was a mere denial and he had not rebutted the presumption raised against him under s 37(d) of the Act. The Court of Appeal found that on the facts, the prosecution had proved its case against the appellant on the reduced charge of possession beyond reasonable doubt. Accordingly, the Court of Appeal substituted the conviction and sentence for trafficking with a conviction and sentence for possession (see paras 14–18).

[Bahasa Malaysia summary

Perayu telah disabit dan dijatuhkan hukuman mati di Mahkamah Tinggi kerana mengedar dadah berbahaya, iaitu sejumlah 795.3g kanabis. Dalam mensabitkan perayu, hakim perbicaraan telah membuat penemuan positif/langsung berhubung milikan tanpa bantuan andaian statutori milikan di bawah s 37(d) Akta Dadah

Berbahaya 1952 ('Akta tersebut'). Berdasarkan penemuan positif/langsung milikan ini, hakim perbicaraan kemudiannya telah menggunakan andaian statutori pengedaran di bawah s 37(da) Akta tersebut. Dalam membuktikan milikan positif/langsung, hakim perbicaraan mendapati elemen milikan atau kawalan kanabis dibuktikan melalui keterangan langsung berikut: (a) perayu telah dilihat dari jauh sedang membawa sebuah beg plastik ('eksh P3'); (b) apabila bertembung dengan pegawai polis, perayu lari dan membaling eksh P3; (c) apabila eksh P3 ditemui, ia didapati mengandungi kanabis. Berhubung elemen pengetahuan, hakim perbicaraan mendapati bahawa perlakuan perayu melarikan diri apabila didatangi polis dan membaling eksh P3 memperlihatkan neksus antara perlakuan beliau dan kesalahan yang dipersoalkan. Perlakuan sedemikian merupakan petanda fikiran bersalah beliau dan adalah memadai untuk membuat kesimpulan bahawa beliau mempunyai pengetahuan tentang kewujudan kanabis itu dalam eksh P3. Perayu telah mengemukakan rayuan terhadap sabitan dan hukuman.]

Diputuskan, membenarkan rayuan tersebut:

(1) Perlakuan tertuduh melarikan diri dan membaling beg itu (eksh P3) juga menimbulkan inferens bahawa perayu berkelakuan seperti mana sepatutnya berhubung apa-apa kesalahan lain berkaitan dengan apa yang terkandung dalam eksh P3. Hakim perbicaraan tidak sedar hal ini. Perlakuan perayu yang sedemikian juga tidak menunjukkan kepada hanya satu kesimpulan bahawa beliau mengetahui apa yang beliau bawa itu adalah dadah berbahaya kanabis. Perlakuan tersebut juga menimbulkan inferens bahawa beliau telah bertindak sepertinya kerana beliau sedang membawa barangan larangan lain atau bahawa beliau panik apabila didatangi pegawai polis yang tidak berseragam itu (lihat perenggan 9–11); *Sim Teck Ho v Public Prosecutor* [2000] 4 SLR 39 dibeza dan *Ton Su Kuan v Public Prosecutor* [2005] 3 CLJ 740 diikut.

(2) Mahkamah Rayuan tidak bersetuju dengan kesimpulan hakim perbicaraan bahawa ia tidaklah perlu untuk pihak pendakwa membuktikan bahawa perayu mempunyai pengetahuan tentang sifat dadah itu. Dalam kes semasa, berdasarkan rujukan kepada kesalahan perayu yang telah dituduhkan itu, adalah perlu untuk pihak pendakwa membuktikan secara langsung atau secara inferens bahawa perayu mempunyai pengetahuan tentang dadah berbahaya dalam beg itu (eksh P3). Di sini, berdasarkan perlakuan perayu, adalah perlu untuk pihak pendakwa untuk menggunakan andaian statutori di bawah s 37(d) Akta Dadah Berbahaya 1952 untuk menganggap perayu mempunyai milikan kanabis itu dan telah mengetahui bahawa eksh P3 mengandungi kanabis. Memandangkan andaian statutori tidak digunakan, tiada kes prima facie telah dibuktikan terhadap perayu (lihat perenggan 12, 13).

(3) Dalam kes semasa, persoalan tentang pengedaran kanabis tidak timbul kerana milikan dadah tersebut oleh perayu tidak dibuktikan oleh pihak pendakwa. Tidak ada keterangan langsung tentang milikan dengan pengetahuan yang diperlukan berdasarkan keterangan yang dikemukakan. Namun, dengan bantuan andaian statutori yang diperuntukkan oleh s 37(d) Akta tersebut, pihak pendakwa telah membuktikan satu kes prima facie untuk kesalahan di bawah s 6 Akta tersebut kerana memiliki kanabis. Pembelaan perayu semasa

perbicaraan pengedaran itu sepatutnya dipertimbangkan sebagai pembelaan untuk mengurangkan pertuduhan milikan. Pembelaan beliau bagaimanapun hanyalah satu penafian dan beliau tidak mematahkan andaian yang ditimbulkan terhadapnya di bawah s 37(d) Akta tersebut. Mahkamah Rayuan mendapati bahawa berdasarkan fakta-fakta berikut, pihak pendakwa telah membuktikan kesnya terhadap perayu berdasarkan pengurangan pertuduhan milikan yang melampaui keraguan munasabah. Sewajarnya, Mahkamah Rayuan telah menggantikan sabitan dan hukuman untuk pengedaran itu dengan satu sabitan dan hukuman untuk milikan (lihat perenggan 14–18).

Notes

For cases on character of accused generally, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 559–589.

For cases on drug trafficking, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 290–391.

For cases on presumptions on drug trafficking, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1954–1957.

Cases referred to

Muhammed bin Hassan v PP [1998] 2 MLJ 273 (refd)
PP v Mohd Farid bin Mohd Sukis & Anor [2002] 3 MLJ 401 (refd)
Sim Teck Ho v PP [2000] 4 SLR 39 (distd)
Taib bin Mohamad v PP [2002] 3 MLJ 476 (refd)
Ton Su Kuan v PP [2005] 3 CLJ 740 (folld)
Warner v Metropolitan Police Commissioner [1969] 2 AC 256 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 6, 37(d), (da)(vi), 39A(2)
Drugs (Prevention of Misuse) Act 1964 [UK] s 1

Appeal from: Criminal Trial No 45-10 of 2001 (High Court, Kuala Lumpur)

Edmund Bon (Nik Mohamed Ikhwan with him) (Chooi & Co) for the appellant.
Tuan Meor Hashimi bin Abdul Hamid for the respondent (Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Kadir Sulaiman JCA (delivering judgment of the court):

[1] The appellant was charged in the High Court with an offence of trafficking in dangerous drug, to wit, cannabis. The charge in Bahasa Malaysia is in the following terms:

Bahawa kamu pada 14 Ogos 2000 jam lebih kurang 12.15 tengahari, di kawasan tanah rezab jalan keretapi, Jalan Pantai Dalam, Brickfields, Kuala Lumpur, Wilayah Persekutuan telah mengedar dadah berbahaya iaitu 795.3 gram cannabis dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s 39B(2) Akta yang sama.

[2] After a full trial, the learned judge found the appellant guilty of the charge and proceeded to convict him accordingly. The judge relied on the fact of actual possession of the substance without having to rely on the presumption provided by s 37(d) of the Dangerous Drugs Act 1952 ('the Act'), and upon the application of the presumption under s 37(da) of the Act thereof, the substance being above the statutory minimum weight of 200g, found him to be trafficking in the substance, having ruled that the appellant failed to raise any reasonable doubt as to the prosecution's case. The substance in this case is cannabis, a form of dangerous drug.

[3] This is an appeal by the appellant against his said conviction upon the charge and the mandatory sentence thereby imposed by the learned judge. We heard the appeal on 10 May 2005. At the end of it, we allowed the appeal of the appellant by setting aside the decision of the learned Judge and in its place we substituted with the finding of guilty upon a reduced charge of being in possession of cannabis under s 6 and sentenced the appellant under the increased penalty provided by s 39A(2) of the Act, to a term of 18 years imprisonment to take effect from the date of arrest, which was on 14 August 2000, with whipping of 10 strokes. We now provide our reasons for so doing.

[4] The learned judge found actual possession of cannabis in the appellant on the evidence before him. The evidence of PW2 shows that the respondent was seen carrying exh P3, a plastic bag, for some distance. When confronted, he ran and was seen throwing exh P3 away. When recovered, exh P3 was found to contain cannabis. As to the custody and control of exh P3 in the appellant, on the evidence, there cannot be any doubt. Therefore, the remaining matter for his consideration is whether the appellant had knowledge that he was carrying the dangerous drug in respect of which he had been charged, ie cannabis. In other words, the issue is whether the appellant had the knowledge that he was carrying cannabis. For such conduct of the appellant, which is running away when confronted and at the same time throwing away the plastic bag containing cannabis, the learned judge held:

> The fact that the accused was carrying exh P3 with its contents followed by the speed at which he ran and threw it upon being confronted show that there is a clear nexus between his conduct and the offence in question. He wanted to part possession with what constituted the offence. It is a clear indication of his guilty mind. This is sufficient to infer that the accused had knowledge of the existence of the dangerous drugs in exh P3.

[5] However, the learned judge was mindful that the inference drawn in this case that the appellant had knowledge of the existence of the dangerous drug does not suggest that he knew that it was cannabis. But relying on his own decision in the case of *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401 following the Singapore case of *Sim Teck Ho v Public Prosecutor* [2000] 4 SLR 39, he was satisfied that the appellant had knowledge of the existence of cannabis in exh P3. He relied his findings on a dicta of Yong Rung How CJ in the case of *Sim Teck Ho*, where the learned CJ said at p 43:

> The appellant was charged with trafficking in a controlled drug, an offence under s 5(1)(a) of the Misuse of Drugs Act (Cap 185) ('the Act'). Section 5(2) of the Act states that a person commits the offence of trafficking in a controlled drug if he has in his possession that drug

for the purpose of trafficking. Section 17(c) of the Act provides a presumption concerning trafficking. It states that any person proved to have possession of more than 2g of diamorphine shall be presumed to have that drug in possession for the purpose of trafficking unless it is proved that his possession of that drug was not for that purpose.

[6] The learned CJ in Sim Teck Ho, then cited the dicta of Lord Pearce in *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256, a decision of the House of Lords involving the meaning of 'possession' for the purpose of s 1 of the Drugs (Prevention of Misuse) Act 1964 as follows:

I think that the term 'possession' is satisfied by a knowledge only of the existence of the thing itself and not its qualities, and that ignorance and mistake as to its qualities is not an excuse.

In conclusion, the learned CJ said:

Therefore, in order to prove possession, the prosecution must prove that there is first, physical controlled over the controlled drug, and second, knowledge of the existence of the thing itself, that is the existence of the controlled drug, but not the name or nature of the drug.

[7] Thus, relying on those cases in the House of Lords and in the Singapore Court, the learned judge, in our present case, followed the decision he made in *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor*, where he concluded at p 420 thus:

It must be observed that in proving this element the obligation of the prosecution is only to establish that the accused had knowledge, either by direct evidence or by way of inference, the existence of the dangerous drug but not its qualities.

[8] Having gone through the report in *Sim Teck Ho*, ourselves, we are of the view that the case can be easily distinguished from the present case before us on the peculiar facts and circumstances prevailing in the case. The Singapore Court of Appeal in that case affirmed the decision of the High Court at first instance. Refer to paras 5–9 of the report, in particular, for the reasons.

[9] In our view, owing to the peculiar facts and circumstances presenting themselves in the Singapore case, without having to resort to any statutory presumption, the accused there can safely be inferred to have been in possession of the controlled drugs, diamorphine, and to have known the nature of the controlled drugs. However, in our present case, the inference of possession of cannabis and the knowledge by the appellant that the dangerous drug contained in exh P3 is cannabis was deduced only from the fact that the appellant 'was carrying exh P3 with its contents followed by the speed at which he ran and threw it upon being confronted' which according to the learned judge would show that there is a clear nexus between his conduct and the offence in question. From the facts, the learned judge was of the view that the appellant wanted to part possession with what constituted the offence and a clear indication of his guilty mind which is sufficient to infer that the appellant had knowledge of the existence of the dangerous drug which in this case is cannabis in exh P3 but without little realizing that from the conduct of the appellant it could

also clearly be inferred that he could have behaved in the manner he did in respect of any other offence relating to what was contained in exh P3.

[10] In support of the findings of the learned judge on the issue of possession of the dangerous drugs, cannabis, the learned deputy for the respondent, submitted that the appellant was seen by the police ambush team headed by PW2 carrying in his right hand exh P3 which contained dangerous drug. The appellant's movement was under surveillance of the ambush team and was seen walking alone in a suspicious manner. When the word 'polis' was uttered he took flight. In the course of it, the appellant threw to the ground the plastic bag he was then carrying. The said bag was subsequently found to contain cannabis. So, on the facts, the learned deputy submitted that the said dangerous drug, was in his possession. The appellant's action in running away when confronted, and at the same time throwing away the plastic bag can be inferred that the appellant had the knowledge that the plastic bag contained the dangerous drug. By running away, it shows that the appellant had the knowledge in regard to the drug in the plastic bag. By throwing away the plastic bag, the appellant wanted to part with possession of the drug.

[11] But in our view, just because the appellant took flight and threw the plastic bag containing dangerous drug does not point to one and only conclusion that he knew what he was carrying was the dangerous drug, cannabis. In the circumstances, other inferences can be made such as that he did so because he may be carrying any other prohibited goods other than cannabis or that he was panicky and therefore chose to run away and throw out the bag he was carrying more so, in this case, when the police who confronted him were not in uniform. In *Ton Su Kuan v Public Prosecutor* [2005] 3 CLJ 740 where the circumstances were very much stronger against the accused in that case than those in the present case but this court held that they were insufficient to constitute proof of possession of the very drug stipulated in the charge. The accused in that case was charged with the capital offence of trafficking in 1,584.93g of heroin and was sentenced to death in the High Court. The evidence for the prosecution was that the drug was found in 356 packets in different parts of the accused's person: 62 packets in the left shoe, 60 packets in the right shoe, 57 packets strapped to the left shin, another 57 packets strapped to the right shin, 60 packets tied to the waist in front and 60 packets fastened to the waist at the back. This court there said as follows:

> In our judgments, the manner in which the packets were fastened to the appellant's person shows at the highest that he had knowledge the packets contained some prohibited substance, perhaps, drugs or perhaps some other substance which was unlawful to have in one's possession. But It certainly does not prove that the appellant knew the packets contained heroin, the drug which forms the subject matter of the charge.

[12] The learned judge in his judgment at p 22 of the appeal record said that in the nature of the charge, it is not necessary for the prosecution to prove that the appellant had knowledge of the nature of the drug. With respect, we cannot agree with such conclusion. By the operation of our Dangerous Drugs Act 1952, in relation to the charge, it is necessary for the prosecution to prove directly or inferential that the appellant had the knowledge of the nature of the dangerous drug he was carrying in the plastic bag. Knowledge in a person is a thing which cannot be seen or

perceived. It can be deduced only from the overt act or conduct short of his own admission. The legislature in its wisdom, realizing the difficulty of establishing by direct evidence of this fact of knowledge, introduced a statutory presumption which is rebuttable, by way of s 37(d) of the Act. In *Taib bin Mohamad v Public Prosecutor* [2002] 3 MLJ 476, this court said at p 480:

> We have examined the evidence adduced in the case at the prosecution stage of the trial to see if the facts disclosed that the accused had actual knowledge of the nature of the drugs so that the judge could have relied on such facts to infer knowledge without resorting to s 37(d) of the Act in which case the invoking of the presumption of trafficking under s 37(da) of the Act would have been correct in law. We did not find sufficient evidence for the judge to infer that the accused had knowledge that the material was cannabis. … the mere throwing of the bag without more cannot constitute knowledge of the contents of the bag. …
>
> There being no evidence from which his knowledge of the drugs could be inferred, the learned judge could not and should not have called the accused to make his defence on the charge of trafficking but the accused because of the presumption of knowledge of the drug raised under s 37(d) of the Act, could be called upon his defence on a charge of possession of the cannabis.

[13] Therefore, upon the conduct of the appellant, only the statutory presumption in s 37(d), can assist the prosecution to deem the appellant to have been in possession of such drug, cannabis and to have known that exh P3 contained cannabis, the subject matter of the charge. However, the learned Judge and the prosecution did not avail themselves of the provisions of s 37(d) thereof. So, on the facts, we disagreed with the learned judge that in the present case involving the appellant, he could be inferred to have the knowledge that what he possessed was the dangerous drug, cannabis. Short of invoking the statutory presumption provided by s 37(d) upon the conduct of the appellant, no prima facie case has been made out against the appellant that he was in possession of cannabis with the requisite knowledge.

[14] Now, having erroneously inferred from the conduct of the appellant to have produced direct evidence of possession of cannabis in him, the learned judge upon the weight of the cannabis found, invoked the presumption contained in s 37(da) thereof thereby presuming the appellant to have been trafficking in such dangerous drug. But as correctly pointed out by the learned judge, the prosecution must first establish that the appellant was in possession of the dangerous drugs before the issue of trafficking in them can arise for consideration. In the circumstances of the view we formed, the issue of trafficking in the said dangerous drug would not at all arise as the issue of possession of the drug by the appellant was not made out by the prosecution.

[15] However, that is not the end of the matter in that the appellant ought to be acquitted entirely of the charge. As stated earlier, there is no direct evidence of possession with the requisite knowledge based on the evidence tendered. But, with the aid of the statutory presumption provided by s 37(d) of the Act, on the facts, the prosecution had made out a prima facie case for an offence under s 6 of the Act for being in possession of the said dangerous drug, cannabis, and as the weight of

cannabis involved is more that 50g, is liable to be punished under s 39A(2) of the Act, if found guilty. Consequently, the appellant ought to have been called to enter his defence for such possession.

[16] To digress, a question may be asked. Now that with the aid of the statutory presumption provided by s 37(d) of the Act, knowledge of the possession of cannabis is imputed on the appellant, why cannot the appellant be proceeded with the trial for the offence of trafficking by invoking another statutory presumption under s 37(da)(vi) of the Act, as the weight of cannabis possessed was 200g or more? The answer to that is to be found in the celebrated decision of *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273. The facts are similar to the present case against the appellant in our present case. On the evidence, the learned trial judge held that a prima facie case had been made out against the accused and that the prosecution had also successfully raised the statutory presumptions under s 37(d) and 37(da) of the Act. The learned trial judge then called on the accused to enter upon his defence on a trafficking charge. On the totality of the evidence, the learned trial judge found that the accused had failed to raise any reasonable doubt on the prosecution's case and had failed to rebut the statutory presumptions under s 37(d) and 37(da) on a balance of probabilities. The accused was accordingly found guilty of the offence of trafficking and was accordingly convicted. The accused appealed. The Federal Court in disposing the appeal held at pp 288–289 as follows:

> In our view, to constitute 'possession' under s 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence.

Continuing at p 858, the Federal Court ruled as follows:

> In our view, on the wording of s 37(da) as it stands, to read the presumption of possession (ie possession as understood in criminal law, with knowledge) provided in s 37(d) into s 37(da) so as to invoke against an accused a further presumption of trafficking (ie presumption upon presumption) would not only be ascribing to the phrase 'found in possession' in s 37(da) a meaning wider than it ordinarily bears but would also be against the established principles of constructions of penal statutes and unduly harsh and oppressive against the accused. We are not unaware that, as a general principle, a statute may place the burden of proof on an accused by necessary implication and without doing so expressly. This depends on the construction of the particular legislation. But a court should be extremely cautious and slow to infer from a statute that Parliament intended to impose on the defendant an onerous duty to prove his innocence in a criminal case. Furthermore, offences involving the trafficking of dangerous drugs are among the most serious in a criminal calendar. Any ambiguity in s 37(da) should be resolved in favour of the accused by placing the burden of proving possession of the substances involved on the prosecution.
>
> We would further add that in so construing as we do, we see no injustice to the prosecution. In a proper case where the evidence so warrants and the amount of the dangerous drugs reaches or exceeds the quantity specified in s 37(da), there is nothing to prevent a trial court from coming to a factual finding of possession as understood in criminal law thereby attracting the presumption of trafficking under the said s 37(da) which, of course, is rebuttable.

Accordingly, we held that the learned trial judge had erred in law in using the presumption of possession under s 37(d) of the Act to invoke the presumption of trafficking under s 37(da) thereof.

[17] Reverting back to our present case involving the appellant, on the view we expressed earlier, there is no express affirmative finding of possession as understood in criminal law but for the legal presumption under s 37(d) of the Act, the appellant cannot be called to enter his defence on the trafficking charge.

[18] But having called for the appellant to enter his defence on the original charge of trafficking in such drug and heard the evidence tendered by the appellant, the learned judge convicted him on the charge of trafficking in the dangerous drug, cannabis. On our part, upon the view we took, the appellant's defence at the trial should have been considered as a defence on the reduced charge of possession in the dangerous drug, cannabis. Considering the defence put up by the appellant which in substance a mere denial of the evidence led by the prosecution particularly the carrying and the throwing away of exh P3, we were of the view that the appellant had not succeeded in rebutting the presumption raised against him under s 37(d) of the Act. Neither has the appellant raised any reasonable doubt as to his custody and control of exh P3 which contained the dangerous drug, cannabis. We were therefore, satisfied that the prosecution had proved its case against the appellant on the reduced charge of possession, beyond reasonable doubt. Consequently, we found the appellant to be guilty of an offence under s 6 of the Act and it is for these reasons we allowed the appeal against the conviction on trafficking and the sentence of death and substituted therefor a conviction for possession of cannabis under s 6 of the Act and sentenced him to 18 years imprisonment to take effect from the date of arrest, which was on 14 August 2000, plus the minimum of 10 strokes of the rattan as so provided by s 39A(2) of the Act, which we considered as fair in the circumstances of the case, after considering the submissions on the sentence to be imposed, from the learned counsel for the appellant on his behalf and from the learned deputy for the respondent.

[19] My learned brothers, Arifin Zakaria and Nik Hashim JJCA have read this judgment in draft and concurred with it.

Appeal allowed.

Reported by John Paul Simon